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In the Supreme Court of the United States

No. 73-410

SOO LINE RAILROAD COMPANY,
Petitioner,

vs.

R. H. FULTON d/b/a R. H. FULTON, CONTRACTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

R. H. FULTON d/b/a R. H. FULTON, CONTRACTOR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Soo Line Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on April 27, 1973, and the order denying petitioner's petition for rehearing in that Court entered on June 4, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit had not yet been reported in the official reports at the date of printing of this petition. A copy of that opinion is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on April 27, 1973, and a copy thereof is appended to this petition in Appendix A, at pages A1-A23. Petitioner and Respondent filed timely petitions for rehearing and the orders of the Court of Appeals for the Eighth Circuit denying both petitions were made and entered on June 4, 1973, copies of which are appended hereto as Appendix B and Appendix C, respectively. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

This case was tried and submitted to a jury on a common law negligence count against Soo Line and a Carmack Amendment count against Rock Island. After jury verdicts in favor of the carriers on the respective counts, the District Court entered judgment in accordance therewith. The Court of Appeals for the Eighth Circuit affirmed the judgment on the Carmack count against Rock Island, but reversed and remanded for trial of a Carmack count against Soo Line. Except for personal service under the Missouri Long Arm Service Statute, Section 506.500, RSMo 1969, the United States District Court for the Western District of Missouri would not have jurisdiction over Soo Line in this action. Therefore, the questions presented are:

1. Did the Court of Appeals err in holding that, although the Carmack Amendment pre-empted a common law negligence action by a shipper against a carrier, the District Court acquired jurisdiction over Soo Line by virtue of service of process under the Missouri Long Arm

Service Statute. Does the District Court have in personam jurisdiction for the purpose of a new trial under the Carmack Amendment, when there has been a judicial determination that Soo Line committed no tortious act within the State of Missouri, and is such holding in conflict with the law of Missouri?

2. Did the Court of Appeals err in holding that a Carmack action sounds in tort *per se*, even when there has been a judicial determination that the carrier was free from negligence, and is such holding contrary to the decisions of the Court of Appeals for the Sixth Circuit?

3. Is a shipper entitled to bring successive Carmack actions against two or more carriers in a line of carriers who handle his shipment, when his suit against one of such carriers results in a judgment adverse to him? Was the failure to submit the Carmack count as to Soo Line harmless error?

STATUTES

The pertinent portions of applicable statutory provisions are:

1. 49 U.S.C. Section 20(11), p. 11903 (1970), which states:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State . . . to a point in another State, . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose

line or lines such property may pass . . . when transported on a through bill of lading . . . and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State to a point in another State . . . or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass . . . when transported on a through bill of lading. . . ."

2. Section 506.500, RSMo 1969, which states:

"1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts: . . . (3) The commission of a tortious act within this state; . . .

2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

STATEMENT OF THE CASE

This action was originally brought by R. H. Fulton d/b/a R. H. Fulton, Contractor, in the United States Court for the Northern District of Texas, Lubbock Division, against Chicago, Rock Island and Pacific Railroad Company (hereinafter called "Rock Island") and Southern Pacific Company, both common carriers by rail, for damages resulting from loss of heavy equipment used in pipe line construction in a train derailment on the lines of Rock Island in Northwest Missouri. The shipment, consisting of eight flat cars of heavy machinery, originated on the lines of the Soo Line Railroad Company (hereinafter called "Soo Line") at Thief River Falls, Minnesota. Soo Line transported the flat cars to Minneapolis, Minnesota, where a nonparty connecting carrier, Minneapolis, Northfield and Southern Railway Company, took possession of the shipment and delivered it to Rock Island at Northfield, Minnesota. Rock Island was to deliver the eight flat cars to Southern Pacific, but the derailment intervened.

The District Court for the Northern District of Texas, Lubbock Division, transferred the case, upon motion by Rock Island, to the Western District of Missouri, St. Joseph Division, in accordance with 28 U.S.C. Section 1404 (a). Fulton then amended his complaint and attempted service on Soo Line in Minneapolis, Minnesota, pursuant to the provisions of the Missouri Long Arm Service Statute, Section 506.500, RSMo 1969.

Fulton's amended complaints pleaded causes of action against Soo Line and Rock Island, both under the Carmack Amendment and in common law negligence. The District Court overruled Soo Line's motions to quash service and the case was tried to a jury in that Court. After a five-week trial, the District Judge submitted the case to

the jury in common law negligence as to Soo Line and under the Carmack Amendment to the Rock Island. In addition, Rock Island had counterclaimed against the shipper, Fulton, and that claim was also submitted to the jury on a negligence theory. The jury returned a verdict in favor of Soo Line on the negligence count as to it. They also returned a verdict in favor of Rock Island on plaintiff's Carmack count and in favor of plaintiff on Rock Island's counterclaim. After timely post-trial motions were filed and by the District Court overruled, plaintiff appealed to the Eighth Circuit Court of Appeals and Rock Island filed a protective cross-appeal.

The Eighth Circuit affirmed the District Court's judgment in favor of Rock Island on plaintiff's Carmack action and in favor of plaintiff on Rock Island's counterclaim, but reversed and remanded for a new trial plaintiff's cause of action against Soo Line under the Carmack count.

Soo Line filed a petition for rehearing on the judgment reversing and remanding the case for a new trial against it under the Carmack Amendment, which was denied. In its petition for rehearing, Soo Line contended, as it does here, that Fulton has no cause of action against it in common law negligence and, therefore, may not acquire jurisdiction over it under the Missouri Long Arm Service Statute. The portion of that statute under which the court below found jurisdiction provides for service on a non-resident for a cause of action arising from the commission of a tortious act in the State of Missouri.

The Court of Appeals for the Eighth Circuit agreed with Soo Line that the Carmack Amendment pre-empted suits in common law negligence against carriers in interstate commerce, holding that *W. D. Lawson and Co.* v. *Penn Central Co.*, 456 F. 2d 419 (6th Cir. 1972), was

"squarely in point" on such issue. The Court further held, however, that, even though a shipper may not sue in common law negligence, if tortious conduct within the State of Missouri is alleged, although not actionable, such conduct does permit service of process under the Missouri statute. Alternatively, the Court below held that a Carmack action does *per se* sound in tort.

Soo Line further contended on its motion for rehearing that not only was the District Court's failure to submit the Carmack claim as to it harmless error, but that having tried one Carmack action to a conclusion, plaintiff was not entitled to a second such action against another carrier.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

Federal jurisdiction in this action was based on both diversity of citizenship and the fact that plaintiff's claim for damage to his shipment arose under a federal statute, the Carmack Amendment, 48 U.S.C. Section 20(11). Jurisdiction of the subject matter was not challenged by any party.

REASONS FOR GRANTING THE WRIT

A. Although Petitioner does not challenge the principle that to initially acquire jurisdiction under a long arm service statute, such as Missouri's, a plaintiff need only establish a prima facie case that the defendant was guilty of the tortious conduct alleged. Petitioner submits that in the first instance, however, the Eighth Circuit was in error in holding that the District Court now has jurisdiction in personam over Soo Line for the purpose of trial of a Carmack action, when there has been a judicial determination that tortious conduct on the part of Soo Line did not occur. The District Judge, by virtue of refusing to charge the jury as Fulton requested, found as a matter of law that Fulton failed to establish a submissible jury issue on all but one act of negligence alleged on the part of Soo Line. The jury found that Soo Line was not negligent in the manner submitted. Consequently, although a full scale trial of a negligence question is not necessary in order to initially determine jurisdiction under the Long Arm Statute, the grounds for such service have been judicially determined not to exist, after a five-week trial.

In remanding for a trial of the Carmack count against Soo, the Court of Appeals held that jurisdiction in personam obtains, because of allegations that Soo Line was guilty of negligence, which constituted tortious conduct in the State of Missouri, contrary to the findings of the jury and District Judge. In finding such jurisdiction that Court relied on *State ex rel. Apco Oil Co.* v. *Turpin*, 490 S.W. 2d 400 (Mo. App. 1973). Petitioner concedes that *Apco* holds that a cause of action for indemnity, which arose from tortious conduct on the part of a third-party defendant, permits long arm service. Such ruling, however, was made at the pleading stage. There having been a litigated determination that Soo Line committed

none of the acts enumerated in the Missouri statute, no cause of action, tort or non-tort, arose from any tortious conduct on the part of Soo Line. Therefore, the ultimate determination has been made that the District Court for the Western District of Missouri has no jurisdiction over Soo Line. Respondent did not contend that such court would have jurisdiction over Soo Line in this case for a Carmack claim alone.

The Court of Appeals for the Eighth Circuit clearly erred in holding that *State ex rel. Apco. Oil Co.* v. *Turpin*, supra, controlled a finding of jurisdiction on the basis of a cause of action arising from tortious conduct. Not only has a court of law established that no tortious conduct occurred, but the Eighth Circuit adulterated the holding of the Missouri Court by so applying that decision. The Court of Appeals relied on language in *Apco* that stated, at 407, "It is really of no significance as to what the cause of action is between Apco and Noury [the manufacturer] as long as that cause of action arises from the commission of a tortious act in Missouri." Now that a competent court has determined, after trial, that no such tortious act occurred, there can be no conduct on the part of Soo Line to authorize jurisdiction by virtue of service under the Long Arm Statute. This is, in effect, a holding that jurisdiction may be acquired without the commission of a tortious act, which is clearly contrary to Missouri law, as espoused in *State ex rel. Apco* v. *Turpin*, supra, and the cases cited therein. No Missouri court has broadened the concept of its Long Arm Statute to permit the acquisition of jurisdiction in this manner and the Court of Appeals for the Eighth Circuit is not empowered to do so. Therefore, such ruling is clearly in conflict with Missouri law on this subject, which is a question of great and overriding importance to the citizens of

the State of Missouri, as well as non-residents having contact with that state.

B. In addition to holding that service under the Missouri Long Arm Statute conferred jurisdiction upon the Federal Court in Missouri by virtue of the allegations of tortious conduct, the Court of Appeals for the Eighth Circuit alternatively held that a Carmack action sounds in tort *per se*. Therefore, it concluded that a Carmack pleading, standing alone, would permit service under the Missouri Long Arm Statute. Petitioner submits not only that this is error, but that such holding is in direct conflict with decisions of the United States Court of Appeals for the Sixth Circuit in *American Synthetic Rubber Corp.* v. *Louisville and N. R. R. Co.*, 422 F. 2d 462 (6th Cir. 1970), and *W. D. Lawson and Co.* v. *Penn Central Co.*, 456 F. 2d 419 (6th Cir. 1972). The Sixth Circuit Court of Appeals held in both of those cases that the Carmack Amendment pre-empted any cause of action for damages arising from failure of a carrier to properly deliver a shipment in interstate commerce. That Court has clearly taken the position that since the cause of action arises by virtue of the contract of carriage, the action sounds in contract and not tort.

Therefore, in *W. D. Lawson and Co.* v. *Penn Central Co.*, supra, Penn Central could not be sued under the Carmack Amendment in the district where the action was brought without other grounds for jurisdiction. Since the common law liability allegations against Penn Central did not state a cause of action, the Sixth Circuit Court of Appeals held that the District Court erred in failing to sustain Penn Central's motion to dismiss both counts. It is significant to note that the Sixth Circuit Court of Appeals was presented with the latter case after a jury trial. Although Penn Central was subject to service under a

Tennessee Long Arm Statute, judgment as to it was reversed for the reasons stated above. In order words, the Sixth Circuit Court of Appeals has held that a Carmack action does not sound in tort *per se*, which is directly in conflict with the holding of the Court below. It is clear in the instant case that the Carmack claim against Soo Line does not sound in tort, because of the judicial determination, after a five-week jury trial, that Soo Line was free from negligence.

There are numerous ways in which a carrier may be liable under the Carmack Amendment, exclusive of any tortious conduct on its part, which shows that this holding is clearly contrary to all reason. A carrier will be held to have breached its interstate contract of carriage, even though it committed no negligence, unless an excepted cause can be shown by it to have been the sole cause of the loss, *Missouri Pacific R. R. Co.* v. *Elmore and Stahl*, 377 U.S. 134 (1964). Even though such carrier was not negligent, and established an excepted cause, it will be liable by virtue of the Carmack Amendment, if an act of a preceding or succeeding carrier in the routing contributed to plaintiff's loss, 49 U.S.C. Section 20(11). Therefore, Petitioner submits that the Sixth Circuit Court of Appeals is correct in holding that a shipper's only cause of action arises solely by virtue of the interstate contract of carriage.

C. The holding of the Court of Appeals for the Eighth Circuit raises a question of Federal law of overwhelming importance to the orderly conduct of interstate commerce, which apparently has not been, but should be, settled by this Court. By virtue of the Carmack Amendment, a shipper may choose as his defendant any one of a line of carriers handling his shipment along the route, convenient to him. In the instant action Respondent chose not to

bring his action against the initiating carrier in the District of Minnesota where the shipment originated. His Carmack claim has been tried unsuccessfully with full opportunity for discovery and a thorough presentation of all evidence. Is the shipper entitled now to retry his Carmack action against Soo Line? If so, and he is unsuccessful in such trial, would he then be entitled to bring yet a third action against the Minneapolis, Northfield and Southern (assuming no statute of limitations problem exists)?

Petitioner submits that the Respondent's claim for loss of his shipment in interstate commerce has been completely subjected to judicial scrutiny to the fullest extent and intent of the law as established by the Carmack Amendment. Had he been entitled to recover from Soo Line or from Minneapolis, Northfield and Southern on a Carmack count, the trial of his Carmack action against Rock Island should and would have resulted in a judgment for him. At the trial of his Carmack action, Respondent was entitled to recover from Rock Island for his loss, whether caused by Rock Island or any other carrier in the routing.

Furthermore, whether Respondent requested the Court to charge the jury as to the effect of the acts of Soo Line in its submission of the Carmack action against Rock Island is not apposite. The judgment in favor of Rock Island in Respondent's Carmack action against it is conclusive "not only in respect of every matter which was actually offered and received to sustain the demand . . . but also as to every ground of recovery . . . which might have been presented." *Mendez* v. *Bowie*, 118 F. 2d 435, 440 (1st Cir. 1941), cert. den. 314 U.S. 639 (1941). See also Moore's Federal Practice, Second Edition, Volume 1B, Sections .412, n. 12, .410[2].

Moreover, the Carmack Amendment was intended to establish with some degree of certainty a carrier's responsibility for transportation of goods in interstate commerce and to relieve the shipper of the burden of determining which carrier of a long line was negligent, or on which line damage might have occurred. *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913), *Reider* v. *Thompson*, 339 U.S. 113 (1949). Those purposes have been more than fulfilled in Respondent's Carmack action against Rock Island. That he was not successful in such action in no way infers that his rights established by the Carmack Amendment were not protected to the fullest extent of the law. Whether he took maximum advantage of those rights is of no consequence, as he has had his day in court. To affirm the Court of Appeals for the Eighth Circuit in permitting a Carmack action to be tried against two different carriers for one loss surely would create chaos and unintended multiple litigation in settling disputes between shippers and carriers for losses in the interstate transportation of goods.

Petitioner further submits that the District Court's refusal to submit the Carmack count against Soo Line was harmless error. In returning a verdict for Rock Island on Fulton's Carmack count against it, the jury necessarily found that Rock Island was free from negligence and that an act of Fulton was the sole cause of the accident. On the negligence submission as to Soo Line, the jury found it free from negligence. Therefore, all liability issues have been litigated. Nothing remains to be tried and it was error for the Court of Appeals to grant Fulton a new trial.

CONCLUSION

For the reasons set forth above, it is submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1344

R. H. Fulton d/b/a R. H. Fulton, Contractor,
Plaintiff-Appellant,

v.

Chicago, Rock Island and Pacific Railroad Company,
Defendant-Appellant-Appellee,

and

Soo Line Railroad Company,
Defendant-Appellee.

No. 72-1376

R. H. Fulton d/b/a R. H. Fulton, Contractor,
Plaintiff-Appellant,

v.

Chicago, Rock Island and Pacific Railroad Company,
Defendant-Appellant-Appellee,

and

Soo Line Railroad Company,
Defendant-Appellee.

Appeals from the United States District Court for the
Western District of Missouri.

Submitted: March 14, 1973
Filed: April 27, 1973.

Before MATTHES, Chief Judge, ROSS and STEPHENSON, Circuit Judges.

MATTHES, Chief Judge.

This case stems from the damages accruing to the shipper, R. H. Fulton, from the derailment of a train transporting his equipment. Fulton appeals from the judgment entered upon jury verdicts for the originating carrier, Soo Line Railroad [Soo] and a connecting carrier, Chicago, Rock Island & Pacific Railroad [Rock Island]. Rock Island has also appealed from the judgment entered upon a jury verdict for Fulton on Rock Island's counterclaim.

Fulton is a pipeline contractor who, upon completing a job in Minnesota, contracted with Soo to transport his equipment from Thief River Falls, Minnesota, to the Southwest. Flat cars were diverted to a siding where Fulton's employees, under the supervision of Soo's inspector, loaded the equipment onto the cars and secured it for transit. It was and is a hotly contested question whether Soo's employee was an active supervisor or passive inspector. Also during the loading, a safety bolt was omitted from the counterweight rack despite a warning plate on the machine that the bolts should be inserted before transporting the machine. According to controverted evidence, this could have allowed the rack to drift out in transit. However, it was also hotly contested whether this caused the accident, or whether the cause was loose cabling of the equipment allowing the entire machine to shift.

After Soo's inspection "bad ordered" two cars for loose cabling, the other eight departed Thief River Falls. At Minneapolis, Soo connected with a nonparty carrier, the Minneapolis, Northfield and Southern Railway, which

transported the cars to a connection with Rock Island at Northfield, Minnesota.

Rock Island was to transport the cars to a connection with the terminating carrier, the Southern Pacific, but, unbeknownst to the crew, one of the cars carrying Fulton's equipment struck the Mill Grove Bridge near the terminal point at Trenton, Missouri. After a rollby inspection at night at Trenton resulted in no discovery of anything amiss, a new Rock Island crew departed Trenton, but after a few miles a machine on the third of Fulton's cars struck Bridge 4194 causing the derailment and the collapse of the bridge.

Fulton then filed this suit[1] against Rock Island[2] and filed an amended complaint also naming Soo. The complaint laid two counts against each carrier, one under the Carmack Amendment, 49 U.S.C. §20(11), and one in common law negligence. Rock Island counterclaimed for the damages to its bridge.

Soo initially moved to quash service, contending Fulton's attempt to effect service through the Missouri long arm statute was ineffectual to confer personal jurisdiction over Soo in this cause. After a hearing at which Fulton showed Soo's activity in the loading, the court denied the motion and held the service conferred jurisdiction. *Fulton* v. *Southern Pac. Co.*, 320 F.Supp. 45 (W.D. Mo. 1970). However, when the cause was submitted, the court de-

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1. The suit was filed at Fulton's place of residence, the Lubbock Division of the Northern District of Texas, but, upon Rock Island's motion, the cause was transferred pursuant to 28 U.S.C. § 1404 to the court closest to the scene of the accident, the St. Joseph Division of the Western District of Missouri. After Soo was named as a defendant, it sought to transfer the cause to the District of Minnesota, but that motion was denied.

2. The complaint by Fulton also named Southern Pacific as a defendant, but Southern was subsequently dismissed from the case.

clined to submit the Carmack Claim against Soo, apparently on the theory that the long arm service was adequate only as to the negligence count.

The primary issue of fact litigated at trial was the cause of the accident. While Fulton did not deny that the safety bolt was omitted, it contended the counterweight nevertheless would not drift and that the cause of the accident was faulty cabling pursuant to Soo's instructions allowing the load to shift and the failure of Rock Island to observe these errors upon inspection. Alternatively, Fulton contended Soo was responsible for the loading and thus was responsible for the omission of the safety bolt, and that Rock Island was contributorily negligent in not observing the missing bolt and not taking ordinary precautions for a wide load which would have revealed the counterweight had drifted. The carriers, of course, insisted Fulton was at fault for omitting the safety bolt, that they had conducted their inspections with ordinary care, and that the drifting counterweight caused the accident.

After a five-week trial, the case went to the jury. After one day's deliberation, the jury requested and received further explanation of the verdict form allowing them to find for Rock Island on Fulton's claim and for Fulton on Rock Island's counterclaim. Neither party had previously objected to this verdict form as inconsistent and neither objected to it at this time. Shortly thereafter the jury returned a verdict for Soo on the single limited negligence count submitted to them as to Soo and announced they were deadlocked on the Fulton-Rock Island claims. The court thereupon charged them to try again to reach a verdict and, after further deliberation, the jury returned a verdict on the form they earlier sought to have explained. Consequently, Judge Duncan entered judgment

for Fulton on Rock Island's counterclaim and for the carriers on Fulton's claims. The court denied the posttrial motions by Fulton and Rock Island for judgment n.o.v. and by Fulton for a new trial, and these appeals followed.

I. FULTON'S APPEAL AS TO SOO

As noted above, Fulton's amended complaints naming Soo as a defendant pleaded causes of action against Soo both under the Carmack Amendment and in common law negligence, but the trial court declined to submit the Carmack issue to the jury. While we are directed to no precise statement in the record that this ruling stemmed from a conclusion the court possessed *in personam* jurisdiction as to the negligence count but not as to the Carmack claim, that apparently was the court's decision because the only reason pressed by Soo to pretermit submission of the claim to the jury was its contention the court lacked *in personam* jurisdiction.[3] Indeed, since Soo clearly comes within the plain language of the Carmack Amendment even if it was not itself negligent,[4] personal jurisdiction

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3. Soo raised the question of *in personam* jurisdiction by two motions to quash service and its answers to the second and third amended complaints. It also filed one set of Suggestions in Support of the Motion to Quash. None of these five filings distinguished between the Carmack count and the negligence count. As noted above, the district court denied the motion to quash, but nevertheless declined to submit the Carmack claim to the jury.

4. The Carmack Amendment, 49 U.S.C. §20(11), when stripped of redundance, provides in pertinent part:

> "Any common carrier . . . subject to the provisions of this chapter receiving property for transportation from . . . one State . . . to . . . another . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line . . . such property may pass . . . and no . . . limitation of any character whatsoever shall exempt such common carrier . . . from the liability imposed; and any such common carrier . . . shall be liable . . . for the

(Continued on following page)

is the only theory we can ascribe to support the ruling. Accordingly, we turn to that question.

Fulton made service pursuant to Rule 4(e), Fed.R. Civ.P., by utilizing the provisions of the Missouri long arm statute, §506.500 V.A.M.S. That statute provides:

"506.500. Actions in which outstate service is authorized

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

Footnote continued—

full actual loss, damage or injury to such property caused by it or by any such common carrier . . . to which such property may be delivered . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or . . . tariff . . ., and any such limitation . . . is declared to be unlawful and void: Provided however, . . . that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law. . . ."

(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

Soo contends that because it made and performed this contract outside Missouri and owns no Missouri trackage the only long arm provision possibly applicable to this case is §506.500(1)(3): "The commission of a tortious act within this state [Missouri]." Soo then advances two alternative arguments why this subsection is also inapplicable.

First, Soo submits the language of the subsection limits its application to actions occurring within the boundaries of Missouri. Pointing out that its allegedly tortious conduct—loading the railcars—occurred in Minnesota, Soo concludes the provision is inapplicable.

Second, Soo asserts Fulton's common law negligence claim is preempted by the Carmack Amendment, leaving only his Carmack count as stating a viable claim. Soo then asserts the Carmack count rests on the interstate contract of carriage, that it therefore sounds in contract rather than tort, and therefore that §506.500(1)(3) is inapplicable.

In addition, Soo contends that even if §506.500 is not inapplicable by its own interpretation, the exercise of personal jurisdiction in this case would contravene due process because Soo does not have the required "minimum contacts" with Missouri. We shall discuss these seriatim.

First, Judge Duncan was clearly correct in holding that Missouri caselaw construes the phrase "commission of a tortious act within this state" to include extraterritorial acts producing actionable consequences in Missouri. *Missouri ex rel. Deere & Co.* v. *Pinnell*, 454 S.W.2d 889 (Mo. Sup. Ct. 1970) (en banc); *Missouri ex rel. Apco Oil Co.* v. *Turpin*, 490 S.W.2d 400 (Mo. App. 1973). *Accord, Buckley* v. *New York Post Corp.*, 373 F.2d 175 (2nd Cir. 1967); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); *Ehlers* v. *United States Heating & Cooling Mfg. Corp.*, 124 N.W.2d 824 (Minn. 1963). *Contra, Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke, Inc.*, 209 N.E.2d 68, 78-81 (N.Y.), *cert. denied, sub nom, Estwing Mfg. Co.* v. *Singer*, 382 U.S. 905 (1965). It is therefore irrelevant to the statute's applicability that Soo's overt activity was confined to Minnesota.

As to Soo's second alternative argument, we agree that the Carmack Amendment has preempted suits in specific negligence by holders of bills of lading against their carriers. *American Synthetic Rubber Corp.* v. *Louisville & N.R.R. Co.*, 422 F.2d 462, 468 (6th Cir. 1970).

> "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation within its jurisdiction." *Missouri Pac. R.R. Co.* v. *Porter*, 273 U.S. 341, 345-46 (1927).

See especially Adams Express Co. v. *Croninger*, 226 U.S. 491 (1913). *See also New York, N.H.&H. R.R. Co.* v. *Nothnagle*, 346 U.S. 128 (1953); *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 (1936); *Chicago & N. Ry. Co.* v. *C.C. Whitnack Produce Co.*, 258 U.S. 369 (1922); *Atchison, T. & S. F. Ry. Co.* v. *Harold*, 241 U.S. 371 (1916); *Atchison T. & S. F. Ry. Co.* v. *Robinson*, 233 U.S. 173 (1914); *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97 (1914); *W.D. Lawson & Co.* v. *Penn Central Co.*, 456 F.2d 419 (6th Cir. 1972). We regard the *Lawson* decision as squarely in point with this case on the preemption issue. *But see Litvak Meat Co.* v. *Baker*, 446 F.2d 329 (10th Cir. 1971).

> "The cases make it clear that when damages are sought against a common carrier for failure to properly perform, or for negligent performance of, an interstate contract of carriage, the Carmack Amendment governs." *American Synthetic Rubber Corp.* v. *Louisville & N.R.R. Co., supra*, 422 F.2d at 466.

However, it does not follow as a consequence of finding Fulton's common law suit preempted that the remainder of Soo's second jurisdictional argument is well taken. Indeed, there are two alternative and independent lines of reasoning yielding the conclusion that the Missouri long arm statute nevertheless applies to Fulton's Carmack claim.

First, contrary to Soo's contention, it is not necessary to characterize the Carmack claim as a cause of action in tort for the statute to apply. Concededly, §506.500(1)(3) is limited to service upon one who has committed "tortious" conduct, and subsection (2) does limit service to a "cause of action arising from" that conduct; but it does not follow that the cause of action must sound in tort. The statute says it applies "to any cause of action arising

from the doing of such acts" and the Missouri courts have construed that phrase literally.

In *Missouri ex rel. Apco Oil Co.* v. *Turpin, supra,* 490 S.W.2d 400 (Mo. App. 1973), a retailer defending a products liability action brought a third party complaint against the manufacturer for indemnity and served process pursuant to §506.500. The manufacturer sought to quash service on the grounds, *inter alia,* that while a consumer suit against it for the negligent manufacture would sound in tort, the suit for indemnity did not and therefore fell without the coverage of §506.500(1)(3). The Missouri Court of Appeals, St. Louis Division, rejected this contention, Judge Simeone saying:

> "It is really immaterial for the purposes of the 'long arm statute' whether the tortious act is deemed committed against General Woodcraft [the consumer] or Apco [the retailer] for the reason that the statute authorizes extraterritorial service whenever a tortious act is committed 'within this state' and the cause of action arises from its commission. . . . *It is really of no significance as to what the cause of action is* between Apco and Noury [the manufacturer] *as long as that cause of action arises from the commission of a tortious act in Missouri.*"

490 S.W.2d at 405, 407 (emphasis supplied).

Clearly then the cause of action under Carmack need not be characterized as tort to come within §506.500(1)(3) so long as it arises from "the commission of a tortious act." It is true, of course, that the preemption of common law claims against carriers makes the "tortious act" relied on here not actionable as a common law tort, but that is not a material problem. In view of the thrust of the *Apco* opinion, we think it sufficient that Soo's conduct gives rise to a cause of action in damages.

Furthermore, even if §506.500(1)(3) were applicable only if the cause of action sued on sounded in tort, we think it would apply to Fulton's Carmack claim because such a claim does indeed sound significantly in tort. It is of course true that the relationship between a shipper and carrier is initiated by the contract of carriage and it is equally true the relationship is highly analogous to bailment. But it is clear the liability of the carrier does not rest upon these factors. The duty of the carrier is erected by the statute, not by the contract, and the parties are not free to alter that duty by their contract. Thus, the liability arises not from breach of the contract but from breach of the statutory duty, and "[w]here a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort." 52 Am. Jur. §26 p. 379. *See also id.* at §§27-28.

Indeed, the nature of the carrier's duty under the Carmack Amendment sounds in negligence. The carrier's duty in the carriage of cargo is due care, *see, e.g., Watson Bros. Transp. Co.* v. *Feinberg Kosher Sausage Co.*, 193 F.2d 283 (8th Cir. 1951); *Seaboard Airline R.R. Co.* v. *Lake Region Packing Assoc.*, 211 So.2d 25 (Fla. App.), *cert. denied*, 221 So.2d 748 (Fla. 1968); it cannot exculpate itself "from loss or responsibility due to negligence," *Missouri, K. & T. Ry. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913); the carrier bears a heavy burden of proof akin to res ipsa loquitur because it has peculiarly within its knowledge the facts which may relieve it of liability, *Missouri Pac. R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134, 143-44 (1964); *Lux Art Van Serv., Inc.* v. *Pollard*, 344 F.2d 883 (9th Cir.), *cert. denied*, 382 U.S. 837 (1965), but it is liable under the statute only for damage "caused by" it and therefore can escape liability by proving the damage was

due to an excepted cause and "that it was free from negligence. . . ." *Missouri Pac. R.R. Co.* v. *Elmore & Stahl, supra*, 377 U.S. at 138. Thus,

> "[d]espite the divergent language in the various cases, it is clear that the duty therein sought to be imposed on the common carrier with respect to transportation and delivery of goods is based on the law of negligence." *Seaboard Airline R.R. Co.* v. *Lake Region Packing Assoc., supra*, 211 So.2d at 27-28.

Accord, United States v. *Reading Co.*, 289 F.2d 7 (3rd Cir. 1961); Skulina, Liability of a Carrier for Loss and Damage to Interstate Shipments, 17 Cleve-Mar. L. Rev. 251, 255 (1968). *See Watson Bros. Transp. Co.* v. *Feinberg Kosher Sausage Co., supra.* Accordingly, a cause of action under the Carmack Amendment sounds in tort.

In sum, we hold, independently and alternatively, that for service under §506.500(1)(3) to be effective it is not necessary that the cause of action pleaded sound in tort, and that even if it were, this Carmack cause of action would be covered because it sounds in tort. Therefore, the service here was statutorily authorized. We turn then to the question whether exercise of the jurisdiction conferred by that statute is constitutionally permissible in this case.[5]

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5. A third independent ground for finding the long-arm statute applicable here could be the view taken by the Sixth and Seventh Circuits of similar statutes. *See Fisons Ltd.* v. *United States*, 458 F.2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041, 92 S.Ct. 1312 (1972); *Southern Machine Co.* v. *Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). In those cases, the courts dealt with the long-arm statutes of Illinois and Tennessee, respectively, which are markedly similar to the Missouri statute *sub judice*. The courts of both those states had construed their statutes "to assert jurisdiction over nonresident defendants to the extent permitted by the" Constitution. 458 F.2d at 1250. Consequently, the federal courts held they should not view the statutes as merely erecting

(Continued on following page)

The precise question now posed is the constitutionality of exercising personal jurisdiction over a foreign corporation whose only contact with the forum state is a single extraterritorial act causing actionable consequences within the forum state. The constitutional question, of course, is governed by the three leading Supreme Court cases, *Hanson* v. *Denckla*, 357 U.S. 235 (1958); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

In *International Shoe* the Court broke with the past and laid down this now familiar rule,

> "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

326 U.S. at 316. The Court also held the minimum contacts "criteria . . . cannot be simply mechanical or quantitive, . . . [but] must depend rather upon the quality and nature of the activity. . . ." *Id.* at 319. Accordingly, the Court said,

> "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an

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Footnote continued—

a few enumerated, inflexible circumstances in which service could be effected, but as establishing one broad flexible test, to wit: if the service satisfies the Constitution, it satisfies the statute. Since Missouri has likewise construed § 506.500 as intended to reach the constitutional limits, *Missouri ex rel. Deere & Co.* v. *Pinnell*, *supra*, we could also adopt this test and avoid "a pedantic quibbling with the wording of the statute," 401 F.2d at 378, making it unnecessary to ask whether only §506.500(1)(3) applies, whether it applies only to tort actions, whether a Carmack claim sounds in tort, etc. However, considering the answers to those questions given above, we find it unnecessary to take this expansive view of a state statute.

obligation or liability on the corporation, . . . because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."

Id. at 318.

The Court followed this holding in *McGee*, where it approved service upon a nonresident insurance company whose only contact with the forum state was sending a form of reinsurance to, and receipt of premiums from, its one policyholder in the state whom it acquired when it absorbed his original insurer. Then in *Hanson*, the Court added a caveat:

> "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."

357 U.S. at 251.

Taking these three cases together, we reject Soo's contention the exercise of jurisdiction upon a "single act" is constitutionally impermissible.

> "[I]t would not be difficult to extrapolate from the McGee decision and opinion a general principle that the due process clause imposes no bar to a state's asserting personal jurisdiction, of course on proper notice, in favor of a person within its borders who suffers damage from the breach of a contract the defendant was to perform there or a tort the defendant committed there. . . . [S]uch a doctrine would not seem to violate basic notions of fair play. . . . Indeed, when [as here,] the operative facts have occurred where the plaintiff sues, the convenience of both parties would often be

> served by a trial there. . . . Unfairness inconsistent with notions of fair play occurs only when a defendant is 'compelled to defend himself in a court of a State with which he has no relevant connection.' And inflicting harm within a state would appear to meet whatever further constitutional requirement may arise from [the] 'territorial limitations on the power of the respective States' [referred to in] Hanson v. Denckla." *Buckley* v. *New York Post Corp., supra,* 373 F.2d at 181 (Friendly J.) (citations omitted).

Accord, Southern Machine Co. v. *Mohasco Industries, Inc., supra; Elkhart Engineering Corp.* v. *Dornier Werke,* 343 F.2d 861, 865-68 (5th Cir. 1965); *Missouri ex rel. Deere & Co.* v. *Pinnell, supra; Missouri ex rel. Birdsboro Corp.* v. *Kimberlin,* 461 S.W.2d 292 (Mo. App. 1970). *Cf. Hess* v. *Pawloski,* 274 U.S. 352 (1927) (motorist's single act).

Bearing in mind the injunction of *International Shoe* that we judge the contacts qualitatively rather than quantitatively, we find no difficulty in holding Soo's role as initiating carrier provides the requisite minimum contacts. As initiating carrier, Soo knew the cargo would traverse Missouri and the derailment occurred there allegedly through Soo's negligence. Surely this provides a "relevant connection" with Missouri. Furthermore, the fairness of a Missouri forum is shown by the fact it is the situs of the accident. Indeed, the Texas District Court transferred the cause to Missouri pursuant to 28 U.S.C. §1404 and the Missouri court then declined a similar transfer to Minnesota. The dual test of constitutionality is therefore met.

In sum, we find the district court had personal jurisdiction over Soo for the Carmack claim, the service of process being statutorily and constitutionally valid. It was therefore error not to submit that count to the jury. Accordingly, we reverse and remand for retrial of Fulton's

Carmack claim against Soo. In view of the fact that all of Fulton's other assignments of error vis-a-vis Soo relate to the common law count now held preempted, we pretermit discussion of those contentions.

II. FULTON'S APPEAL AS TO ROCK ISLAND

In pressing here his contentions that the district court should have granted either his posttrial motion for judgment on his Carmack claim against Rock Island, or alternatively, the motion for a new trial on his complaint, Fulton asserts, respectively, that the verdict entitles him to judgment and that the trial court erred repeatedly in its instructions and in excluding certain evidence. We shall review these contentions seriatim.

A. *Judgment n.o.v.*

To comprehend Fulton's assertion that the verdict entitles him to judgment, one must first understand the respective elements of the negligence and Carmack claims submitted to the jury. Liability in common law negligence, of course, requires the plaintiff (Fulton) to show the defendant's conduct failed to conform to the standard of due care society expects a reasonable man to follow to avoid injury to others in the circumstances, and even if he fulfills this burden of proof his own contributory negligence will defeat the claim. Under the Carmack Amendment, the burden of proof is drastically altered.

> "[T]he shipper establishes his prima facie case when he shows delivery [to the carrier] in good condition, arrival in damaged condition, and the amount of the damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability . . . (a) the act of God; (b) the public enemy;

> (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods." *Missouri Pac. R.R. Co.* v. *Elmore & Stahl, supra,* 377 U.S. at 138, 137.

Here the only exception claimed was the act of the shipper in omitting the safety bolt.

Fulton's argument is that the jury's verdict for him on Rock Island's counterclaim constitutes a verdict either finding Fulton free of negligence or finding Rock Island guilty of contributory negligence and that either finding constitutes a jury conclusion that Rock Island failed its burden of proof on the Carmack claim. Accordingly, Fulton contends he is entitled to a judgment "upon the verdict." However, what Fulton actually seeks is judgment "notwithstanding" the jury's verdict against him on the Carmack claim, but he has not preserved his standing to make that motion because he failed to move for a directed verdict as Rule 51 requires. Nor is it helpful to Fulton that the verdicts appear to be fatally inconsistent, because Fulton twice had an opportunity to object to the form allowing those verdicts and failed to do so. Indeed, we were informed at argument by counsel for Fulton that such an objection was consciously withheld. Accordingly, we hold that Fulton is not entitled to judgment n.o.v. on the Carmack claim and turn to his contentions for a new trial as to Rock Island, which are premised upon several assignments of error in the instructions and rulings on evidence.

B. *Instructions*

Fulton first faults the instructions by assigning as error the court's charge "that there are but two . . . factual questions in this case with respect to what caused this derailment . . . whether . . . this counterweight rack

extended out, or whether the load shifted." App. 1880. Fulton contends this statement is inaccurate, but we disagree. The statement was not part of the court's instructions on liability; it was merely part of the court's preambular comments delineating the issues. The court merely stated, quite accurately, that the evidence showed only two possible causes for the derailment, and proceeded also to state that there was no evidence the width of the load *per se* caused the accident. Thus, viewed in context, this portion of the instruction was not in error.

Fulton next assigns as error the two statements quoted in the margin.[6] He contends the effect of these instructions was to tell the jury (1) that a rollby inspection satisfies the carrier's duty of due care whereas Fulton contends that is a fact question for the jury, and (2) that the duty to inspect extends only to a load shift whereas Fulton contends it extends also to the counterweight drift. However, when the relevant portion of the instruction is read in its entirety, App. 1889-92, it is clear the portions assigned as error are merely excerpts taken out of context of an instruction which, viewed as a whole, accurately states the law.

Finally, Fulton asserts it was error to fail to itemize in the instructions a dozen or so specific acts of negligence by Rock Island which Fulton had tried to prove. We note first that the thrust of this contention is that this was a failure to instruct properly on his common law negligence claim. To that extent it is moot by our holding above that recovery in negligence is preempted by the Carmack Amendment. Second, we note that these alleged

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6. "[T]he carrier is only responsible for ordinary care in what they call a rollby inspection. . . ."

"If, of course, the load did not shift, then any question of inspection in that regard is out of this case."

items of specific negligence contributing to the derailment would also be relevant to the Carmack claim because the carrier must prove its freedom from all contributing negligence. However, the plaintiff was allowed to offer evidence of these allegedly negligent acts and argue them to the jury as contributing causes, and the court did instruct the jury that "the burden is upon the company [Rock Island] to show that it is free of any negligence or that it has caused or contributed to cause the damages complained of by the shipper." Accordingly, we do not think it was prejudicial to the plaintiff that the court declined to lengthen the instructions by itemizing each act of negligence Fulton argued to the jury.

In sum, we find Fulton's contentions faulting the instructions as to Rock Island to have insufficient merit to warrant reversal. We therefore turn to his contentions that certain evidence was erroneously excluded.

C. *Evidence*

The first item of evidence Fulton contends was erroneously excluded is the deposition testimony of three railroad executives concerning the multiplicity of precautions their lines take when transporting wide loads. Fulton's theory was that had Rock Island taken similar precautions because this was a wide load, it would have discovered the drifted counterweight or shifted load, that Rock Island's failure to take these precautions therefore constituted contributing negligence; hence this evidence was relevant to show the standard of care to which Rock Island should have adhered.

While custom is not conclusive of the standard of care, "[w]hat usually is done may be evidence of what ought to be done. . . ." *Texas & P. Ry. Co.* v. *Behymer*, 189 U.S. 468, 470 (1903). Thus, this evidence was relevant, and could have been admitted at the discretion of the

court. *Colorado Milling & Elevator Co.* v. *Terminal R.R. Assoc.*, 350 F.2d 273, 277-78 (8th Cir. 1965), *cert. denied*, 382 U.S. 989 (1966); *Weinberg* v. *Northern P. Ry. Co.*, 150 F.2d 645, 653 (8th Cir. 1945); *Midland Valley R.R. Co.* v. *Bell*, 242 F. 803, 807-08 (8th Cir.), *cert. denied*, 245 U.S. 653 (1917); *Chicago G.W. Ry. Co.* v. *McDonough*, 161 F. 657, 663-66 (8th Cir. 1908). *Accord, Norton* v. *Railway Express Agency*, 412 F.2d 112, 114 (3rd Cir. 1969); Wigmore, Evidence §461 (3rd ed. 1940).

> "[B]ut evidence of that character is not indispensable, for the ultimate and controlling test always is, not what has been the practice of others in like situations, but did the defendant in this case exercise reasonable or ordinary care. . . ." *Midland Valley R.R. Co.* v. *Bell, supra*, 242 F. at 808.

Accordingly, where, as here, similar evidence was admitted and the comparison of defendant's precautions with the custom of his competitors was argued to the jury, the exclusion of the evidence was not so prejudicially erroneous as to necessitate a new trial. *Lowe* v. *Taylor Steel Products Co.*, 373 F.2d 65, 69 (8th Cir.), *cert. denied*, 389 U.S. 858 (1967).

The second item of evidence Fulton contends was erroneously excluded is his offer of the expert testimony of Paul Lilly that if cable clamps are placed on the short end of the cable rather than the long end they will slip. This evidence was excluded because there was no evidence the cables on the derailed cars were clamped on the wrong end. To rebut that ruling Fulton points to the testimony of John T. Bauer, at App. 1050-51, but he said only that the clamps were not spaced far enough apart. Fulton, also argues the destructive nature of the accident prevented determination of how the clamps were affixed, but that hardly justifies the admission of speculation. The evidence

was without proper foundation and thus was properly excluded.

The third item of evidence Fulton contends was erroneously excluded is his offer of testimony by Paul Lilly that Lilly obtained two pieces of cable, one from a derailed traincar and one from a derailed machine, and upon microscopic examination of those cables it was Lilly's expert opinion the cables broke not from the sudden force of the accident, but from being weakened by fraying action resulting from being too loose. This testimony was excluded because the cable was first seen by Lilly three years subsequent to the derailment and after the car and machine had been moved from Trenton to a railroad yard in Kansas City. Since no showing was made that these cables were used to secure Fulton's machinery on the ill-fated cars or, if so, that the cables were in the same condition when Lilly examined them as when the accident occurred, the testimony was properly excluded as immaterial. *Sears, Roebuck & Co.* v. *Daniels*, 299 F.2d 154, 160 (8th Cir. 1962).

Additionally, both excluded portions of Lilly's testimony were intended to show the cables were loose allowing the load to shift and this caused the accident; and Lilly was allowed to give his expert opinion that that was precisely what occurred. Accordingly, the excluded testimony was merely a subpart of an ultimate conclusion that was admitted, and its exclusion was, therefore, not reversibly prejudicial in any event.

The final items of evidence Fulton contends were erroneously excluded were photographs of the two railcars Soo's inspector Knutson, deleted from the shipment as improperly loaded, and the testimony of Clarence Tyree relating to Rock Island's actions in correcting the cabling on those cars. While the pictures might show the two deleted cars were faultily cabled, Soo recognized the im-

proper loading at the same time it approved the other cars ultimately derailed. Accordingly, the inadequacy of these two cars does not infer the other eight were similarly inadequate. The evidence was therefore immaterial and properly excluded.

III. ROCK ISLAND'S CLAIM OF ERROR

The sole contention pressed by Rock Island on its protective appeal from the adverse judgment on its counterclaim is that the court in its instructions erred in placing upon Rock Island the burden of proving its freedom from contributory negligence and should have given Rock Island's requested instruction placing upon Fulton the burden of proving Rock Island contributorily negligent. However, regardless of the substantive merits of this contention, Rock Island failed to object after the charge was delivered to this particular instruction and it is therefore precluded from raising this issue on appeal. Rule 51, Fed. R. Civ. P.

It is not enough that Rock Island had earlier filed a requested instruction placing the burden of proof on Fulton. The purpose of Rule 51 is to compel litigants to afford the trial court an opportunity to cure a defective instruction and to prevent litigants from insuring a new trial in the event of an adverse verdict by covertly relying on the error. *Meitz* v. *Garrison*, 413 F.2d 895, 899 (8th Cir. 1969); *Chicago G.W. Ry. Co.* v. *Casura*, 234 F.2d 441, 445 (8th Cir. 1956). Furthermore, a trial court need not give a requested instruction verbatim but may rephrase the rule of law it embodies so long as he adequately and accurately states the applicable law. *Partlow* v. *Goldstein*, 263 F.2d 169, 171 (8th Cir. 1959). It would therefore undermine the purpose of the Rule to allow a previous request for an instruction to obviate the need for a specific statement of the alleged error. Indeed, that would be contrary to the express command of Rule 51 that

> "No party may assign as error the giving or *the failure to give* an instruction unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds for his objection." (emphasis supplied).

Accordingly, we hold that compliance with Rule 51 is not afforded merely by filing before the charge an accurate requested instruction, but requires that there appear somewhere in the record an objection specifically delineating the objection and the grounds therefor. *See Cone* v. *Beneficial Standard Life Ins. Co.*, 388 F.2d 456, 460-64 (8th Cir. 1968); *Capital Transp. Co.* v. *Compton*, 187 F.2d 844 (8th Cir. 1951).

CONCLUSION

The judgment for Rock Island on Fulton's claim against Rock Island, and for Fulton on Rock Island's counterclaim is affirmed. The judgment in favor of Soo is vacated and the cause is remanded for another trial on Fulton's claim against Soo, in accordance with the views expressed in this opinion. The remand of the cause against Soo is, of course, without prejudice to Soo's right to file again a motion pursuant to 28 U.S.C. §1404 to transfer the cause to the District of Minnesota.

Costs shall be taxed as follows: one-third each against Fulton, Rock Island and Soo.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1972

No. 72-1344

R. H. Fulton, d/b/a R. H. Fulton, Contractor,
Appellant,

vs.

Chicago, Rock Island & Pacific Railroad Company
and Soo Line Railroad Company,
Appellees.

No. 72-1376.

R. H. Fulton, d/b/a R. H. Fulton, Contractor,
Appellee,

vs.

Southern Pacific Company, Chicago, Rock Island &
Pacific Railroad Company,
Appellant, and
Soo Line Railroad Company.

Appeals from the United States District Court for the
Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for Soo Line Railroad Company and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 4, 1973

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1344

R. H. Fulton d/b/a R. H. Fulton, Contractor,
Plaintiff-Appellant,

v.

Chicago, Rock Island and Pacific Railroad Company,
Defendant-Appellant-Appellee,

and

Soo Line Railroad Company,
Defendant-Appellee.

No. 72-1376

R. H. Fulton d/b/a R. H. Fulton, Contractor,
Plaintiff-Appellant,

v.

Chicago, Rock Island and Pacific Railroad Company,
Defendant-Appellant-Appellee,

and

Soo Line Railroad Company,
Defendant-Appellee.

Appeals from the United States District Court for the
Western District of Missouri.

Submitted: March 14, 1973.
Filed: June 4, 1973.

Before MATTHES, Chief Judge, Ross and STEPHENSON, Circuit Judges.

PER CURIAM.

ON PETITION FOR REHEARING

Appellant Fulton has petitioned the Court for a rehearing, urging the Court's opinion is in error in three respects. Two of these assertions warrant no discussion.

The third contention is that this Court erred in pretermitting discussion of Fulton's assignment of error to the trial court's instruction relating to the respective responsibilities of the parties for the loading of the machinery onto the railcars. Fulton contends that, while the remand for a new trial as to Soo would allow the Court to pretermit that question were Soo the lone defendant, if the instruction is erroneous to the degree asserted by Fulton it also affected the cause as to Rock Island by making less difficult Rock Island's burden under the Carmack Amendment of proving that Fulton's negligence was the sole cause of the derailment.

Upon examination of this instruction in its entirety and in context with the other instructions, we are persuaded that, while perhaps susceptible to improvement, it is a substantially correct statement of the applicable law. *See Atchison, T. & S.F. Ry.* v. *United States*, 232 U.S. 199, 216-17 (1913); *United States* v. *Savage Truck Lines, Inc.*, 209 F.2d 442, 444 (4th Cir. 1953); 13 Am. Jur. 2d Carriers 319 (1964); 14 Am. Jur. 2d Carriers §§528-32 (1964). We therefore decline to reverse the judgment as to Rock Island. However, this conclusion in no way precludes Fulton from urging at the new trial against Soo such modifications as he may deem appropriate and as are consistent with the authorities cited above.

The petition for rehearing is denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.